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No. 80-2165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

v.

EUGENE L. HUNT,

Appellee.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

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November 19, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Foundation) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United

States, including Nebraska, whose interests the Foundation represents.

More specifically, WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. WLF's concern for the physical, psychological, and financial impact crime has on its victims, their families, and society has led to the Foundation's establishment of a Crime Victims Program. This program is designed to advance the rights of crime victims and to help reduce the alarming crime rate in America. Among other activities, WLF provides legal guidance and assistance to the victims of violent crime, participates in rulemaking proceedings before the U.S. Parole Commission, and monitors those criminal cases in which the courts have been too lenient in sentencing violent criminals and otherwise have exhibited an insensitivity to the rights of victims and the general public.

In the instant case, WLF seeks to advance the interests of its members, the citizens of Nebraska, and the public at large by urging this Court's consideration of the rights of law-abiding citizens, the victims of violent crime, and of the States in protecting their citizens from individuals charged with serious sexual offenses where the proof of their guilt is evident or the presumption great. The Foundation believes that the states must be permitted to deny bail when they reasonably conclude that the release of individuals charged with sexual offenses involving force, will pose a substantial threat to the safety of the citizens of the state. Therefore, Article I, Section 9, of the Constitution of the State of Nebraska, as amended, is a legitimate constitutional response to increasing violent sexual crimes committed by those who would otherwise be released pending trial.

The Washington Legal Foundation has appeared before this court as *amicus curiae* on numerous occasions.

Briefs *amicus curiae* have been filed with and accepted by the Supreme Court in the following recent cases: *Eddings v. Oklahoma*, No. 80-5727 (brief filed August 12, 1981); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York*, 447 U.S. 530 (1980); *United Steel Workers v. Weber*, 433 U.S. 193 (1979); *Carbon Fuel Company v. United Mine Workers*, 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 322 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 323 (1979); *Federal Trade Commission v. Standard Oil Co. of California*, 449 U.S. 232 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 49 U.S.L.W. 4306 (1981); *Rostker v. Goldberg*, 101 S.Ct. 2646 (1981); *Moody v. Forresster*, 101 S.Ct. 1733 (1981); *First National Maintenance Corp. v. NLRB*, 101 S.Ct. 1510 (1981).

More significantly, WLF recently filed a brief in opposition to petitioner in *Edwards v. United States*, 430 A.2d 1321 (D.C. App. 1981) *petition for cert. filed*, No. 81-5017, in which WLF supported the District of Columbia's preventive detention statute, D.C. Code 1973, § 23-1321 *et seq.*, against charges similar to those made in the instant case, namely that there is a constitutional right to bail under the eighth amendment.

WLF can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties to this case are primarily concerned with the end results of this lawsuit. WLF is concerned with the broader public interest issues indicated above and in providing a balance to the arguments in this case. WLF's concern in this case is to protect the rights of any state to deny bail to individuals where it is feared that their release will pose a serious threat to the safety of its citizens.

STATEMENT OF THE CASE

Appellee, Eugene L. Hunt, raped a child. He was also charged with and convicted of two other forcible rapes. *Hunt v. Roth*, 648 F. 2d 1148, 1151 & n. 2 (1981).[1] Hunt was also charged with several counts of non-sexual felonies and one count of nonforcible sexual assault. *Id.*

The Omaha Municipal Court had denied bail on the forcible rape charges on the basis of Article I, Section 9 of Nebraska's Constitution which states:

> All persons shall be bailable by sufficient sureties, except for treason, *sexual offenses involving penetration by force or against the will of the victim*, and murder where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted.

Neb. Const. Art. I, § 9 (emphasis added).

The citizens of Nebraska had voted overwhelmingly to so amend their Constitution in November, 1978 to add the above clause concerning sexual offenses. Eugene Hunt had stipulated to the court before bail was denied that the "proof [was] evident" and "the presumption great" that he was a multiple rapist. Subsequently, Hunt filed a habeas corpus petition and a civil rights action under 42 U.S.C. § 1983 claiming he was entitled to bail. Although the District Court rejected his claims, the U.S. Court of Appeals ruled that Hunt was entitled to bail under the eighth amendment of the U.S. Constitution.

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[1] A fourth rape charge was dismissed apparently because the victim had moved and became unavailable to the prosecutor. Furthermore, WLF has learned that Eugene Hunt had a prior conviction of statutory rape in Illinois, although that fact was not known to the Nebraska court or prosecutor at the time of his arrest on the Nebraska charges.

SUMMARY OF THE ARGUMENT

The Washington Legal Foundation submits that the court below seriously erred in ruling that Article I, Section 9, of the Constitution of the State of Nebraska violated the Eighth Amendment to the U.S. Constitution.

The excessive bail clause of the eighth amendment to the United States Constitution does not create a right to bail. It merely provides that excessive bail may not be required by the courts where bail is otherwise proper. Whether a particular criminal offense is bailable or not is for the Congress and the various states to decide. The weight of history, judicial precedent, and the public interest, compel the conclusion that states are free to determine which criminal offenses are to be made bailable, so long as that power to classify is not exercised in an unreasonable or arbitrary manner. The determination by the people of the State of Nebraska that persons charged with forcible rape, where the proof is evident or the presumption great, should not be granted an automatic right to bail, is clearly reasonable in light of the violent nature and heinousness of the crime of rape and its harmful effects on the victims, especially children, and the public at large. Furthermore, the Nebraska bail provision is not violative of the equal protection clause contained in the fourteenth amendment or any other Constitutional provision.

ARGUMENT

I. THE DENIAL OF A RIGHT TO BAIL FOR CERTAIN VIOLENT CRIMES WHERE THE PROOF IS EVIDENT OR THE PRESUMPTION GREAT, FURTHERS THE PUBLIC INTEREST IN PROTECTING SOCIETY FROM VIOLENT CRIMINALS, ESPECIALLY RAPISTS.

A violent crime now occurs every 24 seconds somewhere in the United States. Every 23 minutes, a murder is committed. A woman is raped every 6 minutes. There is a robbery every 58 seconds, and an aggravated assault every 48 seconds.[2]

The striking truth about crime is that we are all vulnerable to its random selection, and becoming increasingly vulnerable as America's crime clock continues to tick at a faster rate, with violent crime increasing 11 percent in 1980.

There has been much written and spoken of the pervasive fear of violent crime which threatens the American way of life. The Chief Justice of the U.S. Supreme Court has recently and poignantly spoken out on the subject of violent crime noting the "reign of terror" which has made Americans "hostages within the borders of our own self-styled, enlightened, civilized country."[3]

Rape is the fastest growing and most frequently committed violent crime in America today. Griffin, *Rape: The All-American Crime*, *in* FORCIBLE RAPE—THE CRIME, THE VICTIM, AND THE OFFENDER 48 (1977).

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[2] U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 6 (Sept. 10, 1981). These statistics are not meant to show the regularity of crimes but rather the annual ratio of crime to fixed time intervals.

[3] Address by Chief Justice Warren Burger to the American Bar Association, in Houston, Texas (Feb. 8, 1981).

In 1960, there were 17,190 reported rapes in the United States, 37,990 in 1970, and 82,088 in 1980. And even this figure is significantly underreported.

> Even with the advent of rape crisis centers and an improved awareness by police dealing with rape victims, forcible rape, a violent crime against the person, is still recognized *as one of the most underreported of all Index crimes.* Victims fear of their assailants and their embarrassment over the incidents are just two factors which can override their decision to contact law enforcement.

U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 15 (1981) (emphasis added). The ratio of unreported rapes is estimated anywhere from one in three to one in five. 2 NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, FORCIBLE RAPE 3 (1978). Thus, there were in fact anywhere from 240,000 to 400,000 rapes in the United States during 1980.

The violent nature of this crime is particularly egregious. As noted by one commentator:

> Only recently has it been recognized that the primary motive for forcible rape is a desire to inflict humiliation, violence, and harm upon the victim. It is *not* a desire for sexual gratification. Rape is not the result of an uncontrollable sexual urge that is spontaneously released. A person who has committed such a violent, psychologically motivated crime is capable of committing a similar crime while free on bail.
>
> Those charged with forcible rape pose a significant threat to society and to their victims. They should not be released on bail pending trial. Members of the community, as well as a criminal defendant, have a constitutional right to life and liberty and should

> not have to sacrifice their lives or safety as a price of granting bail to a dangerous rapist prior to trial.

Note, *Forcible Rape and the Right to Bail*, 17 SAN DIEGO L. REV. 1061 (1980) (footnotes omitted).

No female is safe from the violent rapist: Children are raped (as in the instant case); 80-year old women are raped; and even nuns are now prey to the rapist. Washington Post, Oct. 21, 1981, at C7 (Montgomery County, Md.); N.Y. Post, Nov. 2, 1981 at 1 (East Harlem, N.Y.).

The Washington Legal Foundation submits that the court below failed to consider fully the violent nature of this crime and society's right to be protected from the rapist. We believe that the Nebraska Supreme Court's decision in *Parker v. Roth*, 278 N.W. 2d 106 (1979), *cert. denied*, 444 U.S. 920 (1979) upholding the Nebraska bail provision in question, fully understood and appreciated the nature of the crime of rape in deciding that its classification was not unreasonable for bail purposes. Although discussed by that court at some length, *amicus* believes it bears repeating here:

> Certainly the record before us would not in any manner disclose that the classification was unreasonable. Forcible rape has been recognized as a heinous crime committed not by one seeking sexual gratification but rather by one disposed to violence and seeking to inflict harm and violence upon the victim. *See Groth, et al.*, "Rape: Power, Anger, and Sexuality," 134 Am.J., Psychiatry, p. 1239; Gebhard, "Sex Offenders," Harper and Rowe (1965). The victim of a violent forceful rape is not easily rehabilitated. Rape victims are often emotionally scarred for long periods of time, if not for life. Rape is one of the ugliest of crimes. Its very nature is humiliating to the victim and it is frequently accompanied by violence, forced sodomy, and similar acts that additionally traumatize and humiliate. The victimization of the woman does not necessarily cease with the

termination of the attack itself. Pregnancy, venereal disease, hospitalization, loss of employment, imputations of wantonness and even ostracism by family or neighbors may follow. See "Rape and its Victims, a Report for Citizens, Health Facilities and Criminal Justice Agencies," National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice (1975). Rape is a violent crime because it normally involves force, or the threat of force, or intimidation to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. See, Note, The Victim in a Forcible Rape Case: A Feminist's View, 11 Am.Crim.L.Rev. 335; Comment, Rape and Rape Laws: Sexism in Society and Law, 61 Cal. L.Rev. 919. The nature of the injury, both physically and emotionally, often committed on a rape victim is of concern to the state. Rape victims often are unable to return to the mainstream of life and more often than not require extensive therapy and counseling. The state does have a legitimate concern in this area. Nor can we say either under the record as we have it or by common knowledge, that the Legislature was wrong in believing that violent rapists repeat their crimes, motivated by emotional forces over which they have no control. See *State v. Sell*, 202 Neb. ——, 277 N.W. 2d 256. In our view, it is not without rational basis for the Legislature and the people to want to protect society by removing therefrom persons accused of violent rape where the proof is evident or the presumption is great. On balance, such a decision does not appear unreasonable. We cannot say that the Legislature in the first instance and the people thereafter were without any rational basis in suggesting that a person who has committed a violent, psychologically motivated crime is not as likely to commit a similar crime while free on bail.

> We totally reject the notion that rape is not a serious crime. Next to murder there is none which ranks higher; and for reasons which we have already noted, perhaps in some cases, death itself would be easier for the victim to handle than continued life. Appellant argues that denial of bail may be acceptable in a noncapital murder, but not in rape. Appellant's basis for that position is that there are crimes which are punishable by far more severe penalties than rape, but are yet crimes which are bailable. We do not accept that argument. The minimum penalty is not the issue in a determination that violent rape, where the proof is evident or the presumption is great, should not be bailable. The real possibility of repeated acts and further victims pending trial is the issue. Society deserves more.

Id. at 115-16.

This Court has also recognized the heinous nature of rape:

> It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. *Short of homicide, it is the "ultimate violation of self."* It is also a violent crime because it normally involves force, or the threat of force, or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychologigal damage. *Because it undermines the community's sense of security, there is public injury as well.*

Coker v. Georgia, 433 U.S. 584, 597-98 (1977) (emphasis added).

Society does indeed deserve more. Unfortunately, the Eighth Circuit apparently believes otherwise.

II. THE EIGHTH AMENDMENT DOES NOT CREATE A RIGHT TO BAIL, BUT ONLY PROVIDES THAT BAIL SHALL NOT BE EXCESSIVE IN THOSE CASES WHERE IT IS OTHERWISE PROPER TO GRANT BAIL.

The eighth amendment states in relevant part: "[e]xcessive bail shall not be required." *Amicus* submits that the plain meaning of that phrase does not support the proposition that bail is required in certain classes of criminal cases. Even the court below acknowledged this: "The state argues that since the express terms of the eighth amendment do not create a 'right to bail,' but merely forbid 'excessive bail,' the state may refuse to grant bail without violating the eighth amendment. We recognize that there is logical support and some authority for this argument." *Hunt v. Roth*, 648 F. 2d 1148, 1157.

Nevertheless, appellee and the Eighth Circuit insist that the right to bail is a necessary implication of the explicit prohibition against excessive bail. The lower court reasoned that "if legislative bodies are free to define any and all offenses as nonbailable, they may deprive the amendment of any force and accused persons of any protection." *Id.* at 1158. Yet it is conceded that bail may be denied for capital offenses, a distinction not expressed in the eighth amendment. According to the lower court's novel interpretation of the eighth amendment, then even those charged with capital offenses should have a right to bail.

The lower court erroneously presumed that the excessive bail clause was intended primarily to limit the legislative power of Congress rather than to limit the discretion of the judiciary in setting individual bail. *Amicus* submits that the lower court's view is completely contrary to the constitutional history of the eighth amendment and judicial interpretation. Even this Court had occasion to state: "The Eighth Amendment is *addressed to the courts* of the United States exercising criminal

jurisdiction, and is doubtless mandatory to them and a limitation upon their discretion." *Ex parte Watkins*, 32 U.S. (7 Pet.) 568 (1833) (emphasis added). Accordingly, the legislatures are empowered to define those classes of crime for which bail would be denied, and, *a fortiori*, the people of a sovereign state through their own constitution.

Amicus submits that the history of the bail provision indicates that the Framers never intended that there be a right to bail in all cases. Stated briefly, the Framers of the Constitution were well aware of the historical problems of bail in England and could easily have provided that a right to bail exist if they had so desired.[4] They were not, however, attempting to incorporate a new right into the Federal Constitution. This is further suggested by the fact that (1) the excessive bail clause was a noncontroversial provision that provoked little discussion when considered, and (2) shortly before the eighth amendment was approved, Congress passed the Judiciary Act of 1789. That act established a statutory right to bail in noncapital cases and provided that bail was discretionary in capital cases. Therefore, it would have been contradictory for Congress first to pass a law *denying* bail in certain cases and shortly thereafter to approve an amendment *granting* a right to bail without much discussion or controversy.

Although the Supreme Court has not directly ruled on whether there is a right to bail under the eighth amendment, *amicus* submits that weight of judicial authority clearly supports the view that there is no such right. In

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[4] The Framers knew very well how to express constitutional "rights" in no uncertain terms. *E.g.*, first amendment ("freedom of speech"; "right of the people peaceably to assemble") second amendment ("right of the people to keep and bear arms") fourth amendment ("right of the people to be secure in their persons"), *et seq.* For a comprehensive historical analysis of the eighth amendment's excessive bail clause see Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977); Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L. J 1139 (1972).

Carlson v. Landon, 342 U.S. 524 (1952) this Court stated:

> The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed the very language of the amendment fails to say all arrests must be bailable. We think clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases.

Id. at 545-46.

Despite this clear language, the court below preferred to rely instead on the dissenting opinion of Justice Burton in *Carlson*. 648 F.2d at 1157.

While it is true that prior to *Carlson* this Court had referred in dicta to the "traditional right to freedom before conviction," *Stack v. Boyle*, 342 U.S. 1 (1951), *amicus* submits that such language is hardly a basis upon which to overthrow Nebraska's constitutional provision, especially when the *Stack* case was concerned with whether bail had been excessive for a crime that was made bailable by statute. In addition to *Carlson*, other federal and state court decisions lend support for *amicus'* position that bail is not a right. *Sistrunk v. Lyons*, 646 F.2d 64 (3d Cir. 1981); *Mastriam v. Hedman*, 326 F.2d 708 (8th Cir. 1964), *cert. denied*, 376 U.S. 965 (1964); *Turco v. State of Maryland*, 324 F. Supp. 61 (D. Md. 1971), *aff'd*, 444 F.2d 56 (4th Cir. 1971); *United States ex rel. Covington v. Coparo*, 297 F. Supp. 203 (S.D.N.Y. 1969); *Parker v. Roth*, 278 N.W. 2d 106 (1979), *cert. denied*, 444 U.S. 920 (1979); *Edwards v. United States*, 430 A.2d 1321 (1981), *petition for cert. filed* (No. 81-5017).

Accordingly, *amicus* submits that the plain language of the eighth amendment, constitutional history, and the overwhelming weight of judicial precedent clearly demonstrate that there is no constitutional right to bail.

III. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT VIOLATED BY THE 1978 BAIL AMENDMENT TO THE NEBRASKA CONSTITUTION DENYING THE RIGHT TO BAIL TO SEXUAL OFFENDERS WHERE THE "PROOF IS EVIDENT OR THE PRESUMPTION GREAT."

The equal protection clause of the fourteenth amendment to the Constitution of the United States prohibits states from denying any person within their jurisdiction equal treatment under the law. The primary thrust of the equal protection clause is to ensure that all persons in similar circumstances receive similar treatment.

In determining whether a state's action has violated the constitutional guarantee of equal protection the classification in question is subject to two principal tests formulated by this Court. When the state action intrudes upon the individual's ability to exercise a "fundamental constitutional right" such as voting or speech or involves a "suspect class" such as race or national origin then that state action will be subject to the strict scrutiny or compelling interest test. *See, e.g., Massachusetts Board of Retirement v. Murgier*, 420 U.S. 307 (1976). The strict scrutiny test requires that the classification in question be necessary to promote a compelling state interest in order not to be in violation of the Constitution. Where neither a "fundamental right" nor a "suspect class" is involved the Supreme Court has employed a "minimum scrutiny" or "rational basis" test. Under the latter analysis, the state must show that the classification bears some rational relation to a legitimate governmental interest. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969).

The Washington Legal Foundation contends, however, that the right to bail is not a Constitutionally guaranteed fundamental right. As noted earlier, the eighth amendment prohibition against excessive bail does not

provide a fundamental right to bail since the eighth amendment is only pertinent in bailable cases. As recognized by this court in the landmark case of *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), it is not the function of the courts to create substantive constitutional rights where they are not either implicitly or explicitly guaranteed by the Constitution. In the absence of a specific constitutional mandate, the people of Nebraska should be deemed to have acted within their Constitutional powers in enacting the 1978 bail amendment.

Furthermore, as noted earlier in this brief, the classification in question is a reasonable one designed to protect the community from particular reprehensible and violent crime. If the Nebraska classification had been for a non-violent crime, such as check forgery or embezzlement, then appellee's argument may have some merit. But a state is under no obligation to choose between attacking a particular evil wholesale or not attacking it at all.

Amicus stresses that, as pointed out by appellant in its brief at 30, the Nebraska constitutional provision in question does not foreclose the opportunity to bail to appellant. It merely states that he and others in his class do not have any right to bail. Whether bail is granted or not is limited to the exercise of the sound discretion by the court, a discretion which was not abused. Accordingly, the lower court mistakenly characterized the Nebraska provision as creating an "irrebuttable presumption that every individual charged with this particular offense is incapable of assuring his appearance by conditioning it upon reasonable bail or is too dangerous to be granted release." 648 F.2d at 1164.

CONCLUSION

Society has a right to take all reasonable measures necessary to protect its citizens from all crime, especially crimes of violence. Forcible rape has been shown to be increasing at alarming proportions, and the Nebraska provision denying the right to bail in those cases where the "proof is evident" or "the presumption great" is a constitutional response to that problem. The eighth amendment does not provide a right to bail in all cases nor is the fourteenth amendment offended by the provision in question. Accordingly, *amicus* submits that the lower court seriously erred in fashioning a right to bail and urges this Court to reverse the decision of the Eighth Circuit.

Respectfully submitted,

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* *Amicus* wishes to express its appreciation to Michael P. McDonald and Lisa Anne J. Labonte, legal interns, for their assistance in the preparation of this brief.